IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0186
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ADRIAN GARCIA PEREZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054248

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann — Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Scott A. Martin — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Adrian Perez was convicted of armed robbery and aggravated robbery, both dangerous nature offenses, and possession of a deadly weapon by

a prohibited possessor. He was sentenced to concurrent prison terms, the longest of which was 10.5 years. On appeal, Perez claims the trial court erred by refusing to adequately instruct the jury on his theory of defense. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 In October 2005, P. was backing his vehicle out of a parking space at an apartment complex when a car pulled up behind him and blocked his path. Two men got out of the passenger side of the car and approached either side of P.'s car. One of them pointed a handgun through the passenger-side window of P.'s car, and the other pointed a handgun through the driver's-side window and demanded his wallet. P. surrendered his wallet and both men got back into the car, which drove away.

¶3 Two residents of the apartment complex, M. and L., witnessed the robbery, and M. called the police. Within half an hour, Tucson Police Officer Daniel Atkinson observed a car that matched the description M. had given of the robbers' vehicle. Believing the occupants could be armed and dangerous, Atkinson requested backup and, with the help of two other patrol cars forced the suspect vehicle off the road. Both the car's driver and Perez, who was the front passenger, got out and fled on foot. Atkinson ran after the driver, who escaped and was never apprehended. A second officer chased and apprehended Perez with the assistance of a police dog. The third occupant of the car, Henry Barajas, remained in the back seat of the car and was detained.

¶4 Later that night, police officers escorted P. and L. to the scene of the stop, and both identified Barajas as one of the gunmen. They made no attempt to identify the second gunman, however, because the driver of the car had not been apprehended and Perez had been taken to the hospital for treatment of a dog bite he had received. The following morning, police officers showed L. a photographic lineup that presumably included a photograph of Perez, but she did not identify him as the second gunman.

¶5 Perez and Barajas were tried jointly. During the trial, L. testified the second gunman had been wearing a red T-shirt and blue jean shorts. Perez's clothing from that night, which was admitted into evidence, consisted of a red T-shirt and blue jean shorts. His defense, however, was that the unapprehended driver of the vehicle, not he, had been the second gunman and that he had merely been present in the car when the robbery took place. His theory rested on Atkinson's testimony that the driver of the robbers' vehicle had been wearing dark pants and a red and white T-shirt, which Perez claimed was similar to the description L. gave of the clothing worn by the second gunman, and on the fact that neither P. nor L. had identified him as the second gunman.[1]

¶6 At the close of the evidence, Perez asked the court to give the following instruction to the jury on third-party culpability:

> If you find the evidence creates a reasonable doubt about whether the defendant committed the offense because the

[1]M., who had witnessed the robbery and called the police, did not testify at trial.

> evidence suggests that some other third-party in fact committed the offenses, then you must find the defendant not guilty.

The court refused the instruction, finding it would "constitute [a] comment[] by the Court on the evidence" and "preclude[] the theory of accomplice liability." Perez was convicted and sentenced as described above, and this appeal followed.

Discussion

¶7 Perez contends the trial court "erroneously rejected [his] proffered 'third-party culpability instruction,'" arguing the instruction was necessary for the jury to "fully understand the law in light of the evidence presented and his theory of defense." Generally, a defendant is entitled to have the jury instructed on any theory of his case that is reasonably supported by the evidence. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). But a court is not obligated to give an instruction that incorrectly states the law. *State v. Cox*, 214 Ariz. 518, ¶ 17, 155 P.3d 357, 361 (App. 2007). "'[T]he test is whether the instructions adequately set forth the law applicable to the case.'" *Id., quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998).

¶8 Here, the trial court appropriately found the proposed instruction would have "precluded the [state's alternate] theory of accomplice liability." Contrary to Perez's argument, the instruction went beyond merely "clarify[ing] the limits of accomplice liability in light of the facts of this case." It suggested that the jury "must find the defendant not guilty" if the jury found "some other third-party in fact committed the offenses." However, contrary to that implication, the jury could still have convicted Perez if it found he had

"intended to aid, solicit, facilitate or command" the offense. *See* A.R.S. §§ 13-301 and 13-303. Therefore, as phrased, the instruction offered by Perez on third-party culpability was misleading at best.

¶9 We also agree with the trial court's finding that the proposed instruction would have constituted an improper comment on the evidence. *See* Ariz. Const. art. VI, § 27; *State v. Baltzell*, 175 Ariz. 437, 440, 857 P.2d 1291, 1294 (App. 1992). Throughout the trial, the state had asserted the evidence showed Perez had been the second gunman. The jury could have construed the proposed instruction, however, as an assertion by the court that—in the words of the instruction—"the evidence suggests that some third-party in fact committed the offense." Therefore, we cannot say the court erred by refusing to give the proposed instruction.

¶10 Finally, we note that a "trial court is not obligated to give a proposed jury instruction 'when its substance is adequately covered by other instructions.'" *Cox*, 214 Ariz. 518, ¶ 17, 155 P.3d at 361, *quoting Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009. Here, the substance of Perez's requested instruction was encompassed in the court's instructions that the jury "must start with the presumption that [Perez] is innocent," that the state must prove each element of the charges beyond a reasonable doubt, and that the state must prove more than Perez's "mere presence" at the scene of the crime with knowledge that a crime was being committed. *See People v. Abilez,* 161 P.3d 58, 91 (Cal. 2007) (instruction on third-party culpability defense not necessary when jury properly instructed that defendant was

presumed innocent and state must prove charges beyond reasonable doubt); *People v. Earp*, 978 P.2d 15, 54 (Cal. 1999) (no error in refusing defendant's proposed instruction on third-party culpability when jury properly instructed on state's burden of proof and defendant's theory of defense was presented); *State v. Berger*, 733 A.2d 156, 168-70 (Conn. 1999) (instruction on third-party culpability defense unnecessary when jury instructed that defendant presumed innocent and state must prove charges beyond reasonable doubt). Perez claims his proposed instruction was required because the jury might have improperly shifted the burden of proof and viewed the issue as whether Perez had proved the third party's guilt. However, the jury was specifically instructed that the state had the burden of proving each element of the crime beyond a reasonable doubt and that Perez was "not required to produce evidence of any kind."

Disposition

¶11 We find no error in the trial court's instructions to the jury and affirm Perez's convictions and sentences.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge